THE MADRAS LAW JOURNAL

MARCH OF LAW, 1981

Introduction.—As in life so in law things do not remain static. The mills of God may grind slowly but they grind steadily. A learned Judge observed that precedents are the law's device to hold the present prisoners of the past and must bind only if squarely covered[1]. This, however, is but one aspect of the matter. It is true that what has once been settled by a precedent will not be unsettled overnight, for certainty and uniformity are gains not lightly to be sacrificed. Above all is this true when honest men have swayed their conduct upon the faith of the pronouncement[2]. There is no doubt that each case we handle sheds fresh light on some aspect of law and the complexity of human affairs[3]. The rules and principles of case law have never been treated as final truths but as working hypothesis continuously re-tested in the great laboratories of the law, the Court of Justice. If the rules derived from a principle do not work well, the principle itself must ultimately be re-examined[4]. Precedents are thus stepping stones and are not to be regarded as halting places. A good Judge applies the law; a great Judge moulds it in the shape of the social, economic and political conditions that prevail. By doing so he breathes into the law a spirit which throbs with life blood. Interpretation of law has to take into consideration the purpose of law and if it is a law relating to procedure also the impact it is calculated to have on the course of litigation and decision-making.

The doctrine of precedents was woven into the fabric of the Indian legal system through judicial decisions. In *Mata Prasad* v. *Nageshwar Sahai*[5], the Privy Council laid down: "It is not open to the Courts in India to question any principle enunciated by this Board, although they have a right of examining the facts of any case before them to see whether and how far the principle on which stress is laid applies to the facts of the particular case. Nor is it open to them whether on account of judicial dignity or otherwise to question its decision on any particular issue of fact". The doctrine of precedents was given statutory recognition by section 212 of the Government of India Act, 1935 so far as the Privy Council and the Federal Court were concerned, declaring that their decisions would be binding on the Courts in India. Article 141 of the Constitution now provides that the law declared by the Supreme Court shall be binding on all the Courts and authorities in India. As regards the High Court, the theory of precedents is based solely on judicial decisions[1]. In the words of Lord Hailsham: "In the hierarchical system of Courts which exists in this country it is necessary for each lower tier to accept loyally the decisions of the higher tiers". In its XIV Report I, 625, the Law Commission states: "The decisions of the High Courts have not been invested with the authority of law by any enactment. But it is well-settled that the Courts subordinate to a High Court are bound by its decisions and it is not open to them to refuse to follow the law as interpreted by that High Court. The High Courts have made this clear in a number of decisions and have gone so far as to characterise refusal on the part of the subordinate Courts to follow their decisions as to amount to insubordination ".

The following review considers the march of law through the decisions rendered by our

1. *Mani Subrat Jain* v. *Raja Ram Vohra*, (1980) 2 S.C.J. 21.
2. Cardozo.
3. Khanna: Law, Men of Law and Education, p. 1.
4. *Ibid.* 33.
5. 52 I.A. 398, 417.

1. *Ramaswamy* v. *Kotayya*, A.I.R. 1925 Mad. 381; *Dhondo* v. *Mishri*, A.I.R. 1936 Bom. 95; *Venkatanarayana Avadhani* v. *Asst. Settlement Officer*, (1965) 2 An.W.R. 191; *Devi Das* v. *Commissioner of Income-tax*, A.I.R. 1967 All. 414; *Vinayak* v. *Moreshwar*, A.I.R. 1944 Nag. 44.

High Court during the year 1981 under some of the relatively more important titles of the law. The learned Judges have been fully conscious that "the paramount consideration that should prevail is to prevent injustice being caused, be it by a Court or, Tribunal or Statutory Authority or quasi-judicial body, etc., in disposing of matters in which the rights of citizens are involved[1].

Court's powers and jurisdiction.—In *Krishnamoorthy* v. *Jagat Textiles*[2], it is pointed out that when the High Court has been conferred powers under a statute to entertain revisions against the orders of the Authority instituted under such statute and the Court is invested with powers to adopt the procedure applicable to it, in the absence of any procedure contemplated in the Rules framed under the Act, the High Court as a Court of Record will have to decide the revision petition by following the Civil Procedure Code. While entertaining the revision the High Court exercises the powers of a Court created under the Constitution and is not a *persona designata,* so much so if no other special procedure is prescribed for disposal of matters under a particular statute, there is necessary implication that the Code of Civil Procedure will apply and in turn the power of review will be available to the High Court. *Palaniammal* v. *Pallipalayam Jamia Masjid Muthavalli*[3], holds that except the appellate or revisional Court no civil Court can pass an order of *ad interim* injunction which to its knowledge would result in a person being proceeded against for disobeying such an order merely because that person is participating and proceeding with proceedings in another Court which is lawfully exercising its powers. Hence before exercising the inherent power, instead of expecting the other Court to be prudent in not proceeding with the proceedings, the Court wherein the injunction petition is filed, alone should act to avoid embarrassment to both the Courts. Existence of power does not necessarily mean exercise of it without prudence and without precautions being taken, *Karunakaran* v. *Ponnuswamy Achari*[1], states that no progress can be made in the trial, Court if civil revision petitions are admitted against the rulings of the trial Court on the admissibility or otherwise of a particular piece of evidence, since the Court may have innumerable occasions to allow or disallow any particular piece of evidence during the trial of a suit or other proceedings, and the mistake, if any, committed by the trial Court in regard to admissibility of a particular piece of evidence can be rectified by moving the appellate Court in an appeal against the order or decree which may be passed ultimately by the trial Court after taking into consideration or declining to consider the particular piece of evidence, *Kuppana Chettiar* v. *Ramachandran*[2], lays down that so long as an order of the Authorised Officer under the Tamil Nadu Cultivating Tenants Protection Act, is unexceptionable and is not vitiated by any one of the factors enumerated in section 115 of the Code of Civil Procedure, the High Court will have no jurisdiction to interfere with that order.

Bar Council and its powers.—In *Meenakshi-Sundaram* v. *Director of Legal Studies*[3], it is made clear that the Constitution itself provides that any law relating to professional qualifications necessary for practising any profession or carrying on any occupation, trade or business will be valid and not derogatory to the rights of a citizen under Article 19 (1) (*g*), that the prescription made by the Bar Council of India in the rules framed by them regarding attendance in a regular course in a college or the prescription regarding a particular percentage of attendance at such lectures in law relating to the professional qualification necessary, for practising the profession, is saved by Article 19 (6), and that the words "standards of such education" occurring in section 7 (1) of the Advocates Act are not restrictal only to the excellence of the education aimed at but will take in any other matter such as whether the course should be a regular one or may be by correspondence or how much attendance a candidate should have put in.

1. Per Sathiadev, J., in *Palaniappa Gounder* v. *The Additional Collector, Trichy,* (1981) 2 M.L.J. (N.R.C.) 14.
2. (1981) 1 M.L.J. 304.
3. (1981) 1 M.L.J. 147.

1. (1981) 1 M.L.J. 485.
2. (1981) 1 M.L.J. 136.
3. (1981) 2 M.L.J. 141.

Constitutional Law.—In *Mrs. Premila Devi* v. v. *Jaychandran*[1], it is pointed out that the High Court's jurisdiction to grant relief under Article 226 of the Constitution can be invoked only in cases where the other remedies available will not be as effective and efficacious as the one sought to be invoked under that article, that in regard to a claim for the custody of a minor male child of tender age by a mother seeking to displace the custody had by the father the proper forum to agitate the matter will be the Court constituted under the Guardians and Wards Act and the Hindu Minority and Guardianship Act, which can, give effective and efficacious relief after assessing the evidence that may be let in by the respective parties regarding their preferential claims over the child concerned, and inasmuch as there is an effective alternative remedy available to the writ petitioner to agitate her claim, the petition filed under Article 226 was misconceived. *T. N. Electricity Board* v. *T. N. E. B. Accounts and Executive Staff Union*[2], holds that the grant of recognition to a Union conferred a status on the body to represent the workers in a particular category with reference to their service conditions with the management; in other words it becomes a bargaining agent on behalf of the group of workers with reference to which it was recognised, withdrawal of that status of recognition would certainly bring about adverse consequences on that body and if such withdrawal was illegal or in violation of the principles of natural justice, such body could approach the High Court under Article 226. *Nachimuthu Gounder* v. *Government of Tamil Nadu*[3], decides that lifting of water from one's own well in the vicinity of a Government irrigation channel by the use of an oil engine or an electric motor pumpset cannot be said to cause an unauthorised interference with an irrigation work of the Government channel, that the percolation of the channel water into the well, even if true, can only be by reason of natural phenomena, hence the lifting of water from the well using an oil engine or an electric motor pumpset does not constitute unauthorised interference as contemplated in rule 2 (*iii*) of the Rules framed under the Tamil Nadu Act XVI of 1932 and a *mandamus* can be granted forbearing the Government from imposing or levying any penalty or penal assessment. *Subramaniam* v. *Commissioner of Land Revenue*[1], expresses the view that the Licensing Authority to whom an application for grant of a 'no objection certificate' to construct a permanent theatre is made has to follow the procedure set out in the Tamil Nadu Cinemas (Regulations) Rules, 1957; he is entrusted with power subject to those rules and has no inherent power; hence he cannot hear objections made belatedly and reject the application. The rejection is liable to be quashed by *certiorari*. *Venkataswamy* v. *Tamil Nadu Small Industries Development Corporation Ltld.*[2], makes it clear that the function of the Lists in the Seventh Schedule is only to demarcate the legislative fields between Parliament and the States and not to confer any power; each of the Union and State Lists starts by enumerating first Entries dealing with general legislative powers as distinct from taxation power Entries which are separately enumerated thereafter; while interpreting the Entries, it is the duty of the Court to interpret them in their plain, natural and grammatical meaning and read them in their fullest and widest amplitude so as to extend their scope to all ancillary and subsidiary matters which can reasonably and fairly be comprehended in them; the expression "public debts of the State" in Entry 43 of List II refers to public debts owing by the State to others and not to any debt owing to the State by others; it connotes borrowing by the Government from the public and does not take in any amount payable by the public to the Government; the Corporations like the Tamil Nadu Small Industries Development Corporation, the Tamil Nadu Industrial Investments Corporation etc., are companies incorporated under the Companies Act and are called Government Companies; they are thus different from Government notwithsanding that their shares have been underwritten, contributed or guaranteed by the State Government; the amounts due to these Corporations are admittedly not land revenue nor are they amounts due to the State; Entry 45 of List II dealing with land revenue payable to the State has nothing to do with any amount payable by

1. (1981) 1 M.L.J. 497.
2. (1981) 1 M.L.J. 309.
3. (1981) 2 M.L.J. 152.

1. (1981) 2 M.L.J. 410.
2. (1981) 2 M.L.J. 254.

any person to anybody else; therefore, the State Legislature under that Entry will have no power to enact a law for the purpose of collecting the dues owed by a person to a Corporation and from this point of view section 52-A of the Tamil Nadu Act I of 1964 as introduced by the Tamil Nadu Act XII of 1972, will be outside the legislative competence of the State; nor can Entry 43 of List II, providing for recovery in a State of claims arising outside the State be invoked to support the legislative competence of the Tamil Nadu Legislature to enact section 52-A of the Tamil Nadu Act I of 1864.

Madras Agriculturists Relief Act.—In *Jugra Lodha* v. *Nataraja Naicker*[1], it is made clear that before a debtor claims the benefit of Madras Act IV of 1938, as amended by Madras Act VIII of 1973, he should prove that he was an "agriculturist" both on the date of the debt and on the date when the debt is sought to be recovered by filing a suit. In addition he has to prove that he was an agriculturist on 18th March, 1972. *Arumugha Nadar* v. *Kumara Pillai*[2], holds that where property mortgaged by the original debtor was salt pans with reservoirs, wells etc., which were being exploited under a licence and the order of the Court appointing the official receiver as the property guardian of the first defendant (the son of the original debtor) showed that the latter was possessed of not only a saleable interest in agricultural lands but also possessed a considerable extent of coconut garden, a large extent of salt pans and a small factory in Tuticorin with a licence to manufacture salt; the possession of the coconut tope would involve an assessment under the Agricultural Income-tax Act, and the working of the salt pans would have involved the first defendant to an assessment to profession tax as well as income-tax; hence it is for the first defendant to prove by producing the accounts and other materials that no liability to agricultural income-tax or by way of professional tax or income-tax was involved and that he does not come under any of the proviso to the definition of agriculturist. *Chidambaram Chettiar* v. *Subramaniam*[3], decides that owelty directed to be paid by one coparcener to another for equalisation of shares at a partition, if treated as a debt and scaled down under Act IV of 1938, will naturally result in an inequality in the division of the properties which was not obviously intended by the provisions of that Act; hence having regard to the objects of the Act owelty amount is not liable to be treated as a debt as defined under the Act and as such it is not liable to be scaled down; also liability to pay interest realised by a coparcener by investment of common funds would be exempt from the operation of Act IV of 1938, if the coparcener using the common funds had derived a personal benefit therefrom and had acted in a fiduciary capacity. In such a case the liability is one arising under a breach of trust and cannot be scaled down. *Marudhavana Desigar* v. *Thangamani Ammal*[1], expresses the view that even assuming that the purchaser of the equity of redemption in some of the items of the mortgaged property had established that she was an agriculturist on the date of her application for scaling down the mortgage debt it is not possible to hold that the debt was payable by an agriculturist on the date of the mortgage and that the original debtor was an agriculturist on the date of the debt. *Uthaman Chettiar* v. *Nagappa Chettiar*[2], states that section 8 (4) of the Tamil Nadu Agriculturists Relief (Amendment) Act, 1973, providing for refund of excess amount governs payments made both before and after the coming into force of that Act; excess payments voluntarily made to the creditor or decree-holder are saved from the operation of section 8 (4) if they had been made willingly and voluntarily towards full or part satisfaction of the decree and they have been so appropriated by the decree-holder; payment made as a condition precedent to obtaining stay is neither voluntary nor towards the decree; section 8 (4) does not affect the right to restitution in respect of collections wrongfully made.

Industrial and Labour Law.—In *Machine Tools and Ancillaries (P.) Ltd.* v. *Additional Labour Court*[3], it is pointed out that an order of dismissal of an employee after a domestic enquiry without giving an oppor-

(*To be continued*)

1. (1981) 2 M.L.J. 150.
2. (1981) 2 M.L.J. 35.
3. (1981) 2 M.L.J. 424.

1. (1981) 1 M.L.J. 512.
2. (1981) 1 M.L.J. 200.
3. (1981) 1 M.L.J. 133.

tunity to the employee as contemplated in Order 17 (4) (*c*) of the Model Standing Orders is invalid and therefore the Labour Court was justified in setting aside the same.

Ramaswamy Iyer v. *Bhuvaneswari Pulverising Mills*[1], states that there is no provision in the Industrial Disputes Act, which makes it incumbent upon a workman to obtain the leave of the Court which appointed the receiver, where the concerned employer is a receiver appointed by a civil Court. The power to make an order of reference is conferred on the appropriate Government by section 10. The power to refer or not to refer a dispute for adjudication by a Labour Court or Industrial Tribunal is a discretionary power vested in the appropriate Government. So long as there is no statutory provision in the Industrial Disputes Act, that before an order of reference is made under section 10 the Government or the workman concerned is bound to obtain the leave of the Court that appointed the receiver, no such condition can be incorporated in the Act. The power conferred on the Government under the provisions of a special statute, *viz.*, the Industrial Disputes Act, in the interest of industrial peace and harmony cannot in any manner be said to be controlled by any general principles of law that the leave of the Court which appointed the receiver should be obtained before instituting any proceeding against the receiver and the enquiry before the Labour Court under the Industrial Disputes Act, on a reference under section 10 cannot be said to be an enquiry initiated by a party against the receiver or against the property in the hands of the receiver. *Subramaniam* v. *State Bank of India*[2], expresses the view that where an employee of a co-operative Society was suspended and as per bye-law 12 (*h*) discretion was exercised not to grant him subsistence allowance and he applied under section 33-C (2) for such allowance, the power of suspension under that bye-law includes the power to suspend pending disciplinary proceedings, the authority competent to suspend has a discretion either to award or not to award subsistence allowance, that such discretion has to be exercised reasonably and not whimsically or arbitrarily; the seriousness of the charge levelled against the appellant can certainly be a ground for declining to grant subsistence allowance and that it is not correct that the discretion related only to the quantum and not for the total rejection of the subsistence allowance itself.

1. (1981) 1 M.L.J. 458.
2. (1981) 1 M.L.J. 509.

M/s. Sundaram Finance Ltd. v. *State of Tamil Nadu*[1], decides that where the main part of the business activity of an establishment was the rendering of services to its customers by advancing moneys to purchase motor vehicles on hire-purchase, the money being advanced on the security of the vehicles themselves, such an establishment is a "shop" within the meaning of Notification No. 1088, dated 26th December, 1978, issued under the Tamil Nadu Shops and Establishments Act, 1947, and it is not necessary that the service should be personal services rendered in the premises of the establishment shop itself. *Ramaswami* v. *Needle Industries (P.) Ltd.*[2], lays down that an appellate authority is a creature of statute, any power exercisable by it is to be traced to the statute which created it and having regard to the language of section 41 (1) and (2) of the Shops and Establishments Act, there must be first an action on the part of the employer dispensing with the services of an employee and if that action is absent there is no question of an appeal under section 41 (2). Hence where the employee had sent his resignation letter requesting the employer to relieve him on that date itself and the employer accepted the resignation letter and relieved him from his duties, that will not constitute a case of the employer dispensing with the services of the employee.

Contracts and ancillary laws:—In *Natesa Mudaliar* v. *Sulochana Ammal*[3], it is held that whether the amount paid at the time of contract of sale was treated as advance or deposit or earnest money, section 74 of the Contract Act, will be attracted and notwithstanding the clause for forfeiture of the said amount, the party in breach will be entitled only to a reasonable compensation subject to the maximum amount mentioned in the agreement of sale. The clause for the forfeiture of the advance, in the instant case, Rs. 25,000,

1. (1981) 1 M.L.J. 301.
2. (1981) 1 M.L.J. 488.
3. (1981) 2 M.L.J. 215.

was in the nature of a penalty and the innocent party can get only reasonable compensation. *Perumal Reddiar* v. *Bank of Baroda*[1], points out that an unauthorised material alteration by the promisee whether that is by adding anything to or by striking out any part of a written contract avoids the contract against the person otherwise liable upon it; if in a printed form of guarantee the signature of the guarantor is obtained prior to the filling up of the blank spaces relating to material particulars of the contract, the filling up of the blank spaces in the form amounts to material alteration especially when the said deed relating to the contract of guarantee is in the possession of the promisee or his agent and discharges the guarantee; if the alteration is to the disadvantage of the surety or its unsubstantial nature is not self-evident the surety can claim to be discharged. *Union of India* v. *United India Fire and General Insurance Co., Ltd.*[2], expresses the view that the Railway (bailee) is not expected to anticipate the failure on the part of the consignee to take delivery of the goods within a reasonable time after the unloading thereof and also to anticipate a fire and to provide for all contingencies.

National Co-operative Sugar Mills Ltd. v. *Albert and Company*[3], makes it clear that a contract of sale cannot be said to be complete unless the parties to the contract had agreed as to the time for payment of the price and for taking delivery of the goods; in the absence of any earlier agreement as to these matters, the seller cannot unilaterally fix the time for payment of the price and taking delivery of the goods and he cannot unilaterally cancel the contract after the buyer had committed default; time cannot be taken to be the essence of the contract where the contract itself does not stipulate the time for payment of the price and it is only in cases where the time is the essence of the contract the vendor can cancel the contract for non-payment of the price within the time stipulated; section 20 of the Sale of Goods Act, proceeds on the basis that where there is an unconditional contract for the sale of specific goods in a deliverable state, the property in the goods passes to the buyer when the contract is made and it is immaterial whether the time for payment of the price or the time for the delivery of the goods is postponed.

1. (1981) 1 M.L.J. 419.
2. (1981) 2 M.L.J. 128.
3. (1981) 2 M.L.J. 343.

Sudalai Muthu Pillai v. *Santhanam*[1], states that section 69 (3) (*a*) of the Partnership Act, shows that notwithstanding the prohibition contained in section 69 (1), an unregistered partnership agreement could be enforced for obtaining only three reliefs and no more, namely: (*i*) to apply for dissolution of the firm and for accounts; (*ii*) to ask for accounts of a dissolved firm; (*iii*) to realise the property of the dissolved firm; the reference to the power to realise the property of a dissolved firm can be only for the benefit of the other partner or partners but not for one's individual benefit and it cannot include a case where the partner of a dissolved firm sues the other or others for recovery of a specific sum of money.

Radhakrishnan v. *Rani Ammal*[2], points out that an agreement of reconveyance does not create any interest in immovable property and therefore there is no need to register such an agreement; *a fortiori* a release of any right under that document will not create any interest in immovable property and no registration is called for and such agreement could be specifically enforced.

Balakrishna v. *Official Assignee*[3], declares that section 73 of the Negotiable Instruments Act, having regard to the language in which it is couched, does not permit the contention that where the drawer is not shown to have suffered any damage he is not absolved under that section from the obligation to have the cheque paid if the cheque is not presented within a reasonable time. Where the appellant was hand-in-glove with the payee in not presenting the cheque within the time allowed for the purpose and known to the mercantile practice, the appellant had lost his right to have recourse against the drawer.

Property Law and related legislations.—In *Muthuswami Gounder* v. *Annamalai*[4], it is held that where a plaintiff, who lives about

1. (1981) 1 M.L.J. 147.
2. (1981) 1 M.L.J. 244.
3. (1981) 1 M.L.J. 417.
4. (1981) 1 M.L.J. 258.

a mile away from the suit property would have come to know about the defendant putting up structures on a major portion of the suit property if he had cared to find out and since he had not done so and kept quiet till the defendant had completed the constructions and had sent a notice only after several months thereafter asserting his right to the suit property, the principle of acquiescence would apply and the plaintiff can be given only a decree for compensation in respect of the property in lieu of the relief of recovery of vacant possession of the property. *Ranganathan* v. *Chellammal*[1], expresses the view that the benefit of the covenant for title under section 55 (2) of the Transfer of Property Act runs with the land and is enforceable by the subsequent purchasers of the land and if the buyer resells to several purchasers, each of the purchasers is entitled to sue on the covenant in respect of the part purchased by him. The purchaser who was compelled to give up possession by reason of the breach in the warranty of title given by the vendor is entitled to recover the market value of the land at the time of eviction as damages. *Palani Gounder* v. *Thirumalai Gounder*[2], holds that if the condition for repurchase of property is embodied in the same document there is a presumption that the document is a mortgage by conditional sale; it is for the party challenging the presumption to establish that there is a sale and not a mortgage; that to establish the intention it would be possible to refer to the surrounding circumstances for which oral evidence can be let in, but subsequent conduct would be inadmissible in evidence. *Sengottian* v. *Lakshmi*[3], points out that by introducing the doctrine of unjust enrichment the provisions of section 92 (*iii*) of the Transfer of Property Act, would be rendered *otiose*; moreover a subrogee can proceed only against the hypotheca claiming a money decree against the purchaser of the property. *Venkatachalapathy Odayar* v. *Rajalakshmi Ammal*[4], decides that if a right is created in respect of a land for a specified time and the grantee is expected to exploit the land for purposes of his own, then the transaction is one of lease; but where without creating any interest in the land the right to collect the usufructs from the trees standing on the land alone is given, the grantee cannot claim to be a lessee but is only a licensee. Regard should be had to the substance of the transaction and the intention of parties to determine whether a particular transaction is a lease or a licence. *Appa Rao* v. *Maragathammal*[1], observes that the expression 'denial of the title of the landlord has always been known to the law of landlord and tenant and incorporated in the Transfer of Property Act, which provides for forfeiture in case the lessee renounces his character as such by setting up a title in a third person or by claiming title in himself.

1. (1981) 2 M.L.J. 395.
2. (1981) 2 M.L.J. 122.
3. (1981) 2 M.L.J. 282.
4. (1981) 1 M.L.J. 11.

Murugesan v. *Sundarlal*[2], makes it clear that reading section 2 (*aa*) and section 2 (*d*) of the Tamil Nadu Cultivating Tenants Protection Act, together, a person who claims to be a cultivating tenant must be a person who contributes his labour or that of any member of his family in the cultivation of land, land being defined as used for purpose of agriculture under a tenancy agreement, express or implied, appertaining to the land and its cultivation; the tenancy agreement must attach to the land and if land does not figure, the lessee is not a cultivating tenant at all within the statutory definition. Where therefore, the lease only impinges on the usufruct of the trees standing on the land and the land is severely excluded from the ambit of the subject-matter of the lease the lessee cannot be regarded as a cultivating tenant within the meaning of the Act. *Kuppana Chettiar* v. *Ramachandran*[3], expresses the view that the question that has to be considered in respect of default by tenant in payment of rent to warrant an order of eviction is not with reference to any date subsequent to the order of the Authorised Officer but, with reference to the date fixed by him prior to his passing the order of eviction. *Kandaswamy* v. *Sowrirajan*[4], states with reference to an order of eviction that if on the day when the order

1. (1981) 1 M.L.J. 71.
2. (1981) 2 M.L.J. 179.
3. (1981) 1 M.L.J. 136.
4. (1981) 1 M.L.J. 14.

was passed there were justifiable circumstances for the Court to hold that the tenant was the person who had wilfully avoided payment and he had not only dragged on the matter but had not also given any *bona fide* reason for grant of any further time, the order cannot be disturbed.

Narayana Pillai v. *Naganatha Iyer*[1], lays down that by reason of the definition of "kudiyiruppu" in section 2 (6) of the Tamil Nadu Occupants of Kudiyiruppu (Conferment of Ownership) Act, 1971, the lease or license to enjoy, should have been only in respect of sites; the definition does not apply to a pucca building which an agriculturist may take on lease; by *Explanation* to section 2 (8) a presumption is raised, namely, any person occupying the kudiyiruppu is an agricultural labourer or an agriculturist until the contrary is proved; to hold that the site of any dwelling house or hut is a kudiyiruppu one has to ascertain whether the occupant either as a tenant or as a licensee is an agriculturist or an agricultural labourer; no presumption can be made that any person is an agriculturist or agricultural labourer till the site of the dwelling house or hut in his occupation is found to be a kudiyiruppu; therefore the presumption raised by the *Explanation* is of no avail to any party who claims to be an agriculturist merely on the basis of a contention that the site in his occupation is a kudiyiruppu, and an agriculturist can claim that the site in his occupation is a kudiyiruppu only if he is a tenant or licensee in respect of the site alone. *Visalakshi* v. *Maruthamuthu Pillai*[2], decides that so long as the occupant is not the owner of the superstructure he can claim benefit as agriculturist under section 3 (2) of the Act and such superstructure also shall, with effect from the date of commencement of the Act, vest in him absolutely free from all encumbrances. *Veerappan* v. *Shanmugavelu*[3], makes it clear that under section 3-B all the issues involved in the case shall be tried by the Authorised Officer; section 23 bars the jurisdiction of the civil Court in respect of such matters which the Authorised Officer is specifically empowered to determine; and the combined effect of these provisions is that in the field exclusively earmarked for the Authorised Officer the civil Court's jurisdiction is taken away. *Gopal Gounder* v. *Kothandarama Gounder*[1], holds that where the defendants were agriculturists in occupation of kudiyiruppu lands as licensees on 19th June, 1971, and as such the kudiyiruppu land vested in them absolutely free of all encumbrances under the Tamil Nadu Act XL of 1971, the claim of the defendants for the benefits of that Act cannot be defeated by merely referring to the denial of the plaintiff's title in the written statement.

Hindu Law and ancillary legislation.—In *Mahalinga Iyer* v. *State of Madras*[2], the Supreme Court points out that so far as Tamil Nadu is concerned there is an initial presumption that a temple is a public one and it is up to the party who claims that it is a private temple to establish the fact affirmatively. The dedication to the public need not be by a deed but may be spelt out of the circumstances present. The crucial question is whether the public worship in the temple as of right. Where the temple itself is situate on Government land, processions are taken out and offerings are made and the structure especially of gopuram and mandapam also indicates the public nature of the temple, it cannot be regarded as a private temple. *Anga Naicker* v. *Ponnusami*[3], states that it is for the plaintiff to discharge the heavy onus that lies on him to prove that any property which he claims to be divisible belongs to the joint family; the existence of any property in the hands of any member of the family cannot be taken to be derived from the joint family assets; for a property to lose its character as separate property and assume the character of joint family property there must be evidence to show that the owner voluntarily threw the property into the joint stock with the intention of abandoning all separate claim on it; in regard to a business carried on by a member of a joint family there is no presumption that it is a joint family business and in the absence of evidence to

1. (1981) 1 M.L.J. 506.
2. (1981) 2 M.L.J. 293.
3. (1981) 2 M.L.J. 366.

1. (1981) 2 M.L.J. 402.
2. (1981) 1 M.L.J. (S.C.) 1.
3. (1981) 2 M.L.J. 51.

show that the business was built out of joint family funds it has to be taken as the business of the member. *Vaithilinga Naicker* v. *Vivenkananda Reddiar*[1], points out that when the sons are joint with the father and debts have been contracted by the father for his personal benefit, the sons are liable therefor on the principle of pious obligation, if the father's debts are not tainted with illegality or immorality; the son's liability is not a gratuitous obligation but a necessary and logical corollary to the doctrine of the son's right by birth to a share of the ancestral property; so, even if the debt was incurred not for family benefit or necessity the pious obligation of the son to pay the father's debt would entitle the creditor to bring the whole joint family property to sale for recovery of the debt provided it is not tainted with illegality or immorality; in respect of a debt incurred for his own personal benefit it is also open to the father to mortgage the joint family property including the son's interest therein to discharge an antecedent debt: the father's power of borrowing so as to bind the son's interest in the joint family property in respect of a debt incurred for his personal benefit has no relevance while considering the doctrine of pious obligation of the son to pay his father's debt not tainted with illegality or immorality: if the father executes a mortgage to discharge an antecedent debt it will certainly bind the son's interest in joint family property and there is hardly any need or scope for invoking the rule of pious obligation in such cases. *Ranganatha Naidu* v. *Balarama Naidu*[2], reiterates the position that a son cannot claim any right by birth in the properties inherited by his father from his maternal grandfather and consequently cannot impugn the alienations of such property by his father: nor will the fact that the son also enjoyed the income from the properties so long as they were in the family, suffice to show abandonment of his exclusive rights by his father or an intention on his part to throw the property into the hotchpot and treat them as joint family property.

Mohana Srinivasan v. *Girija*[1], expresses the view that where nullity of marriage is sought under section 12 (1) (*b*) of the Hindu Marriage Act, the onus is on the petitioner to prove pre-nuptial pregnancy of the wife; he has to establish about the birth of the child and that it was subsequent to the marriage and that he had no access before the marriage. *Venkatachalapthy* v. *Saroja*[2], decides that where the petitioner had an opportunity to let in medical evidence in the trial Court to establish the condition of his wife the respondent of having infantile uterus as claimed by him but took no steps, and had taken the definite stand that he was not going to examine any doctor he should be taken to have not established that his wife had infantile uterus; an interlocutory application in the lower appellate Court to direct the wife to medical examination is frivolous; further a person cannot be directed to be examined medically against her wish and since the wife had opposed the petitioner's application and denied the defects in her, no medical examination can be ordered against her wish. *Rajagopalan* v. *Kamalammal*[3], lays down that permanent alimony can be granted even to an erring spouse and the fact that the wife was the guilty spouse can only be taken as a relevant factor in assessing the conduct of the parties and in determining the amount of such alimony: a guilty party cannot take advantage of her guilt and make a profit out of such conduct which cannot be ignored when quantifying the maintenance payable by the aggrieved spouse. *Mrs. Premila Devi* v. *Jayachandran*[4], makes it clear that while the custody of a child below the age of five may be normally given to the mother, if the custody of such child is with the father it will not be illegal: the legal guardianship which vests in the father under section 7 of the Hindu Minority and Guardianship Act, clearly spells out the legislative intention of the interest of the child being taken into consideration for giving such custody: and further such custody of the tender child to be with the mother is only a preferential claim and the fact that it is with the father

1. (1981) 2 M.L.J. 86.
2. (1981) 2 M.L.J. 295.

1. (1981) 1 M.L.J. 321.
2. (1981) 1 M.L.J. 440.
3. (1981) 2 M.L.J. 359.
4. (1981) 1 M.L.J. 497.

cannot make such custody illegal. *Sundaramoorthy* v. *Shanmugha Nadar*[1], points out that where the father is alive he is the only person who can deal with the properties of a minor from whichever source the minor would have got the properties and that when he had not participated in the transactions as the minor's guardian to exercise the legal right that flew out of it, there is no scope for holding that, by implication, because he was an attestor he had acted as the guardian of the minor.

Chellaiyan v. *Sathiakrishnan*[2], states that under section 20 of the Hindu Adoptions and Maintenance Act, a Hindu is under a legal obligation to maintain his or her children so long as they are minors and in the case of daughters to incur the reasonable expenses incidental to their marriage; the said obligation exists whether there is joint family property or not; under section 22, the heirs of a deceased Hindu are bound to maintain the dependants of the deceased out of the estate inherited by them from the deceased: the claim of a brother for contribution of the marriage expenses of the sisters from the other brothers will not be tenable as the primary liability is of the father and the sons had not inherited any estate from the father: and where the plaintiff and the first defendant were found not to be in possession of any joint family property they were not bound to reimburse their share of expenses of the marriage of their sisters stated to have been incurred by another brother.

Chockalingam Pillai v. *Alamulu Ammal*[3], makes it clear that where on the death of a Hindu in 1942 having interest in joint family property leaving a wife, son and daughter and the wife died in 1963, the interest which the latter had taken under section 3 (2) of Act XVIII of 1937, so long as it was not lost or extinguished on the date of the commencement of the Hindu Succession Act of 1956, will be automatically enlarged under section 14 (1) of the latter Act and the daughter will, on her death be entitled to an equal share along with the son.

1. (1981) 2 M.L.J. 276.
2. (1981) 2 M.L.J. 362.
3. (1981) 2 M.L.J. 23.

Law of Limitation.—In *Ghose Khan* v. *Rent Controller*[1], it is held that the 'Controller' within the meaning of the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960 is not a Court but only a statutory functionary competent to exercise the power given to him under that statute, and therefore, the provisions of the Indian Limitation Act are not applicable to proceedings pending before him, though he is clothed with all procedural powers of a civil Court in executing the orders passed by him. *Venkai Marbon* v. *Dakshinamoorthy*[2], takes the view that the appellate authority under section 23 of the Rent Control Act was not a *persona designata* but can be regarded as a civil Court for purposes of section 5 of the Limitation Act and he has power to excuse the delay in filing an appeal from the order of the Rent Controller; the approach which section 29 (*b*) of the Act demands as regards any special or local law is whether such law expressly rules out, either wholly or to any lesser extent, the applicability of section 5 and not whether such law is a complete Code providing for everything or almost everything; we should concentrate on the particular judicial or quasi-judicial tribunal concerned and find out on an examination of its origin, its functions and tenure whether it can be treated as a Court for purposes of section 5: there is no principle or precedent which stands in the way of holding that the appellate authority under the Rent Control Act is a Court within the meaning of section 5 and there is nothing inherently extraordinary about the fixation of time-limit for an appeal under the Rent Control Act; any idea of excusing the delay even for a sufficient cause must be assumed to have been quite beyond the contemplation of the legislature. *Bagiammal* v. *Subramaniam*[3], expresses the view that in considering whether a delay of 79 days in filing an application to set aside an *ex parte* decree due to the petitioner's illness should be excused, the Court was entitled to bring to bear a humanistic approach to the decision once it was convinced that the illness alleged was real. *Muthu-*

1. (1981) 2 M.L.J. 388.
2. (1981) 1 M.L.J. 275.
3. (1981) 1 M.L.J. 253.

lakshmi v. *Swaminathan*[1], elucidates, that rule 129 of the Civil Rules of Practice contemplates that a copy application should be kept with the office at least for three working days after stamps are called for and during this period the copy application is neither returned to the party nor struck off; the granting of three days' time to furnish stamp papers after notice or intimation cannot therefore be stated to be time lost by a party due to his carelessness or negligence or laches but should be regarded as time requisite to enable the Court to get ready the copies; where the litigant furnishes the copy stamps on the third day, he having taken that time cannot be attributed to any negligence or laches on his part as that time is made available by the Rules; the totality of the period of three days permitted under rule 129 of the Civil Rules of Practice would also fall within the category of "time requisite" within the meaning of section 12 (2) and (3) of the Limitation Act. *Commissioner of Hindu Religious and Charitable Endowment* v. *Kacherichamy*[2], states that section 15 (1) of the Limitation Act would apply only to a case where the law requires a notice to be given to the defendant or defendants; if a notice under section 80, Civil Procedure Code is not necessary the plaintiffs cannot rely on section 15 (2) of the Limitation Act; since section 70 of the Tamil Nadu Hindu Religious and Charitable Endowments Act confers a statutory right to file a suit against an order passed by the Deputy Commissioner, no notice under section 80, Civil Procedure Code is necessary. *Lakshmanan Chettiar* v. *Alagappa Chettiar*[3], points out that while under section 18 of the Limitation Act, there should be an acknowledgment of liability, under section 19, an endorsement of payment need not imply an acknowledgment of liability; the mere fact of payment as evidenced by the endorsement will have the effect of extending the period of limitation. *Bhagyathammal* v. *Dhanabhagyathammal*[4], lays down that where a purchaser had not acted on the basis of any representation made by the vendor and deliberately purchased the property with a view to speculate on a litigation, he cannot recover damages for violation of the covenant of title; where from the inception the vendor had no title to convey and the vendee had not been put in possession of the property, the breach occurred even on the date of the sale and the starting point of limitation, would be the date of the sale. *Kuppuraj* v. *Arjunan*[1], states that Article 67 of the Limitation Act, can apply only when the landlord files a suit for recovery of possession of the property from a tenant; where the suit is one for partition and separate possession of the plaintiff's share valued under section 37 of the Court Fees Act, 1955 for the purpose of court-fee and jurisdiction. Article 67 of the Limitation Act has no application. *Krishnan Nair* v. *National Small Industrial Corporation*[2], expresses the view the "specific movable property", described in Article 69 must be the property which is not lost to the owner as a result of theft, dishonest misappropriation or conversion; where machinery purchased under a hire-purchase agreement contrary to the terms of the agreement is sold it is a case of conversion falling within Article 68, and when the plaintiffs became aware of the transfer as early as 21st February, 1968, and a suit was filed in September, 1972, it was clearly barred. *Muthaiah Chettiar* v. *Krishnaswami Gounder*[3], states, that there is no warrant for holding that Article 134 will apply only when an application for delivery of possession is filed under Order 21, rule 95 of the Code of Civil Procedure and will not apply when the application for delivery of possession is made under section 47 of the Code; nor is there any warrant in principle or authority that to an application for delivery of possession under Order 21, rule 95, Article 134 will be attracted whereas if the application was under section 47 of the Code. Article 137 will be attracted; Article 134 alone will apply to an application filed by an auction-purchaser of immovable property at a sale in execution of a decree for delivery of the property purchased by him.

---

1. (1981) 2 M.L.J. 194.
2. (1981) 2 M.L.J. 275.
3. (1981) 1 M.L.J. 232.
4. (1981) 2 M.L.J. 154.

---

1. (1981) 1 M.L.J. 222.
2. (1981) 2 M.L.J. 44.
3. (1981) 1 M.L.J. 103.

Law of Evidence.—In *Meenakshisundaram* v. *Venkatesan*[1], it is pointed out that under section 114 (*f*) of the Indian Evidence Act, the Court may presume that the common course of business has been followed in particular cases and that letters containing the correct address of the respondent posted should have normally reached him; hence where letters written by the tenant's wife to the landlord requesting the adjustment from out of the interest due under certain promissory notes executed in her favour by the landlord towards the rent and electricity charges payable as per their agreement and remit the balance of interest to the tenant were sent under certificates of posting to the correct address but the receipt of the letters was denied by the landlord, in the absence of any evidence to show that anything happened which prevented the letters from reaching him, the conclusion is irresistible that the respondent received all the letters and that those letters clearly establish the subsistence of an agreement for adjustment of the rent and electricity charges from out of the interest payable by him to the tenant's wife. [*N.B.*—In this context, a notable decision of the Supreme Court in *Harcharan Singh* v. *Shiv Rani*[2], may be useful. It holds, that when a registered envelope containing a notice demanding arrears of rent is tendered by the postman to the addressee but is refused the presumption of proper service or effective service on the addressee would arise. It is not necessary that before knowledge of the contents could be imputed the sealed envelope should be read over to him by the postman or some one else. When service is effected by a postal communication the addressee must be imputed with the knowledge of the contents thereof and this follows upon the presumptions raised under section 27 of the General Clauses Act, 1897 and section 114 of the Evidence Act, 1872].

Insolvency Law.—In *Official Assignee* v. *Mangalambal*[3], it is pointed out that a suit for recovery of money as such against the defendant who has been subsequently adjudicated an insolvent cannot be said to "relate to the property of the insolvent" and to such a suit the official assignee cannot be either a necessary or a proper party. *Chandrasekharan* v. *Official Receiver*[1], holds that a combined reading of section 28 (2), (6) and (7) of the Provincial Insolvency Act will lead to the inference that in the case of a secured creditor his right to realise or otherwise deal with the security will not be affected by the vesting provided for in section 28 (2) or by the doctrine of relation back provided for in section 28 (7) of the Act. *Parasurama Mudaliar* v. *Ramanathan*[2], states, that after enumerating the debts in respect of which an insolvent shall not be released in spite of an order for discharge under section 44 (1), section 44 (2) is specific and categoric, that except as provided by sub-section (1) an order for discharge shall release the insolvent from all debts provable under the Act; the statutory release as a result of the order of discharge is confined only to the insolvent and not to the other judgment-debtors; while, therefore, providing for the release of the insolvent only from the debts as a result of the discharge, section 44 (3) still preserves the liability of persons who had bound themselves to pay along with the insolvent, and, this is a pointer, that the mere circumstance that amongst a set of judgment-debtors one is adjudicated insolvent and later obtains a discharge, cannot absolve the other co-judgment-debtors also from their liability under the decree.

Civil Procedure Code.—In *Sundaresan* v. *Ramachandran*[3], it is elucidated, that the use of the words "as if such order related to the execution, discharge or satisfaction of a decree within the meaning of section 47 of the Code of Civil Procedure" in section 25 (1) of the Tamil Nadu Debt Relief Act, 1979 clearly indicates that though the effect of the order passed under the Act is not that of a decree and even if the effect of an adjudication under section 47 of the Code is taken outside the scope of the definition of a decree in section 2 (2) of the Code, such an adjudication shall nevertheless be treated as a decree, though in fact, and also in law it is not. *Jayaraman* v.

1. (1981) 2 M.L.J. 288.
2. (1981) 2 S.C.J. 250.
3. (1981) 2 M.L.J. 137.

1. (1981) 1 M.L.J. 491.
2. (1981) 1 M.L.J. 38.
3. (1981) 1 M.L.J. 389.

Glaxo Laboratories[1], states that a judgment under section 2 (9) of the Civil Procedure Code, should contain the grounds for a decree or order and where the judgment in a case does not satisfy that requirement it cannot be held to be a judgment on the merits of the case.. *Abdul Jabbar* v. *Indo-Singapore Traders*[2], declares, that the uniform view of all the High Courts in India is that a decree passed by a Court under the summary procedure after refusing leave to defend sought by the defendant is not a judgment on merits. *Annamalai Chettiar* v. *Union of India*[3], expresses the view that section 20 of the Civil Procedure Code, contains general provisions regarding the jurisdiction of Courts in respect of institution of suits and the provision in section 80 of the Railways Act was enacted in 1961, hence the two provisions cannot stand together and it may even be stated that section 80 of the Railways Act is an exception to section 20 of the Code of Civil Procedure with reference to the institution of suits claiming compensation against railways. *State Trading Corporation of India* v. *Mohite & Co.*[4], decides that where a contract was made in Delhi and delivery had to be made in Bombay where the goods were located, there is no question of any contract being entered in Madras or any cause of action having arisen here; where the cause of action was the non-payment of the amount paid as advance or earnest at Delhi where it was received, the cause of action for its return had necessarily to be at that place. The legal position is well-established that the existence of a subordinate office cannot give rise to jurisdiction unless the cause of action at least in part arose at that place. *Arokiasami* v. *Martial Margaret*[5], elucidates that when a sale is set aside and the purchase money deposited in Court has not been paid to the decree-holder or the judgment-debtor, the right to the return of the money arises under the Common Law and the auction-purchaser is entitled to it; even *de hors* Order 21, rule 93, the auction-purchaser would be entitled to the amount; rule 93 only enables an executing Court to direct payment of the money with or without interest in a case where the money deposited in Court has been withdrawn by any other, person; if it has not been withdrawn and is available in Court, the auction-purchaser is entitled to its re-payment and the question of the liability to pay interest thereon by the judgment-debtor or the decree-holder has to be decided with reference to the facts and circumstances in each case and on a finding as to who was responsible for the irregularity or fraud in conducting the sale or for setting aside the sale itself; neither the right to claim re-payment of the purchase-money nor the interest thereon is a creature of statute, nor has the statute, provided any specific remedy for the same in order to bar a civil suit; the re-payment of the purchase-money on the sale being set aside as such has no effect on the execution, discharge or satisfaction of the decree itself as the money belongs to the auction-purchaser who is entitled to it by reason of the sale being set aside; on the question of the liability to pay interest or the person who is liable to so pay to the auction-purchaser also no question of execution, discharge or satisfaction of the decree is involved, as the liability would depend on common law and also on the facts of the case and the finding as to who was responsible for the irregularity or fraud resulting in the setting aside of the sale. The question as to who is to bear the poundage is also not one relating to the execution, discharge or satisfaction of the decree and has to be decided with reference to the relevant rules. *Amma Gounder* v. *Ponnusami*[1] states, that where a debtor is sought to be arrested and put in civil prison for non-payment of a decree debt the execution Court cannot rely for support of its order entirely on the pleadings of the judgment-debtor; a reference to section 51 shows that the execution Court should satisfy itself that the judgment-debtor has or has had since the date of the decree the means to pay the amount of the decree or some substantial part thereof but all the same refuses or neglects or has refused or neglected to pay the same; sec-

1. (1981) 2 M.L.J. 11.
2. (1981) 1 M.L.J. 318.
3. (1981) 2 M.L.J. 91.
4. (1981) 1 M.L.J. 452.
5. (1981) 2 M.L.J. 448.

1. (1981) 2 M.L.J. 229.

tion 51 further insists that the Court's satisfaction must be entered for good reasons to be recorded in writing in the order; the provisions of section 51 do not depend for their implementation on the attitude which the judgment-debtor might take when notice goes to him in the execution petition, and whether or not the judgment-debtor resists the petition and whether or not he denies that he has means the Court cannot shrik its responsibility under the Code of instituting an enquiry to find out whether the judgment-debtor has the requisite means to pay and yet wilfully refuses or neglects to pay the amount; merely to close the discussion on the issue raised on the basis of the Act XXXI of 1976, namely, whether the judgment-debtor could be regarded as a "small farmer" within the meaning of the Act and straightway direct that he shall be put in prison if he did not pay the debt by a certain date is not the way in which the matter should be disposed of. *Union of India* v. *Tamil Nadu Small Industries Corporation Ltd.*[1], elucidates that there is no requirement under section 80 of the Code, that statutory notice in a suit against the Central Government relating to the railways must be addressed to any particular person, much less to the General Manager; the requirement under section 80 is that the notice should either have been delivered to the General Manager or left at the office of the General Manager; personal notice to the General Manager is not required or contemplated under section 80; if the notice is left at the office of the General Manager in the hands of a responsible senior official of the office both the letter and spirit of section 80 must be taken to have been complied with. *Manickam* v. *Ramaswamy Gounder*[2] holds that while a plaintiff who asks for reliefs in the alternative and puts the alternative reliefs on a par with each other should be deemed to have made an election even at the threshold and after grant of one of such alternative reliefs is not an "aggrieved person" who could carry the matter to the higher Court for the grant of that relief which was not given by the trial Court; the position will be different if the two prayers cannot be treated as alternative reliefs in the strict sense of the term; unless a party is shown to have fully approbated to an alternative granted to him he will not stand legally precluded from reprobating the decree and re-agitating his claim for the other relief which was not given to him; where the plaintiff had not placed the alternative relief of partition asked for by him on a par with the main relief of declaration of title and injunction the defendants cannot contend that the plaintiff was not an "aggrieved person" and consequently his appeal to the lower appellate Court was itself not maintainable. *Karunakaran* v. *Ponnuswamy Achari*[1] points out that no progress can be made in the trial Court if civil revision petitions are admitted against the trial Courts' ruling on admissibility or otherwise of any particular piece of evidence; the proper course is to agitate it in the appellate Court in an appeal against the order or decree that may be passed ultimately by the trial Court. *Palaniammal* v. *Pallipalayam Jamia Masjid Muthavalli*[2], expresses the view that the power of grant of injunction is an inherent power which is not limited to what is prescribed under Order 39 of the Civil Procedure Code; the inherent power cannot be invoked to the extent of preventing another civil Court from proceeding with a matter on its file unless it is subject to the appellate or revisional jurisdiction of the other Court; even when exercising its inherent power the Court is bound to find out whether the expediency of the matter calls for an *ex parte* order of *ad interim* injunction being passed or whether the purpose cannot be achieved by first issuing notice to the party and thereafter pass necessary orders on the injunction petition. *Venkatachalapathy* v. *Saroja*[3], lays down that the power under section 151 cannot be invoked for an order for compulsory medical examination of the wife in a petition for divorce by the husband under section 13 (1) (*b*) of the Hindu Marriage Act. *Sri Kanyaka Parameswari Davasthanam* v. *Ambalavana Sannadhi*[4], points out that Order 1, rule 10 of the Code enables

1. (1981) 2 M.L.J. 189.
2. (1981) 1 M.L.J. 163.

1. (1981) 1 M.L.J. 485.
2. (1981) 1 M.L.J. 147.
3. (1981) 1 M.L.J. 440.
4. (1981) 1 M.L.J. 43.

the name of any person to be substituted or added as plaintiff in the suit which had been instituted through a *bona fide* mistake and it is necessary for the determination of the real matter in dispute to do so; the Court may order any other person to be substituted or added as plaintiff; it has also *suo motu* powers or on application to order that the name of any party improperly joined may be struck out or to join any other person as plaintiff or defendant or whose presence before the Court may be considered necessary to enable the Court to effectively and completely adjudicate and settle all the questions involved in the suit. The judgment of the Court could only be corrected in the manner envisaged by section 152 of the Code in respect of any clerical error or arithmetical mistake in the judgment or by recourse to the provisions of Order 47, rule 1, authorising a review of a judgment under certain specified conditions. Where an application does not fall under any of these provisions, there is no scope for interference with or setting aside an earlier judgment. *Jayaraman* v. *Glaxo Laboratories*[1], holds that even in a case where the Court acts under the provisions of Order 8, rule 10 and proceeds to pass a judgment against the defendant for his failure to file a written statement such a decree is only an *ex parte* decree which would fall within the scope of Order 9, rule 13; the application of Order 8, rule 10 results in a decree not by admission but owing to the default of the defendant to file a written statement which in its real meaning and substance is only an *ex parte* decree. *Sriram Chits and Investments* v. *Padmanabhan*[2], elucidates that whatever might have been the position prior to the amendment of he Code of Civil Procedure by Act CIV of 1976, now, under Order 20, rule 11 (2) the Court, after the passing of the decree, is empowered to pass an order directing the payment of the decree amount in instalments on an application by the judgment-debtor and with the consent of the decree-holder and on such terms as to the payment of interest, the attachment of the property of the judgment-debtor, or the taking of security from him or otherwise as the Court thinks fit; where in proceedings instituted long after the amended Order 20, rule 11 (2) had come into operation though the judgment-debtor had made an application for a direction that the decree amount should be made payable in instalments, yet, the decree-holder had opposed the same and therefore had not consented to the payment of the decree amount in instalments which is a vital condition as per the amended provision, the application cannot be granted. *Natarajan* v. *Indian Bank*[1] makes it clear that the Court's power to fix an upset price for the property, which includes within it a right to reduce the upset price wherever necessary, has not only been available to the Court all through, but such a right is an irremovable one, and the said right has not been infringed in the least by the second proviso to clause (*a*) to Order 21, rule 66, introduced by Act CIV of 1976; when the Court fixed an upset price the Court was not determining the rights of any of the parties before it and the fixation of the upset price was only for facilitating the conduct of the sale and, at the same time, safe-guarding the interests of the judgment-debtor by fixing a reserve price; notwithstanding the fixation of the upset price and notwithstanding the fact that the bidder had offered an amount higher than the upset price, it would still be open to the judgment-debtor to approach the executing Court and adduce proof that the property had been sold for a low price on account of some material irregularity or fraud in the publication or conduct of the sale and have the sale set aside. In *Suresh Babu* v. *Balasubramaniam*[2], a Full Bench points out that Order 21, rule 72 (3) did not require that a Court can set aside a sale under that rule only if the person who applied for the setting aside proved that he had sustained substantial injury by reason of breach of rule 72 (1); rule 72 (3) did not refer to the applicant sustaining any injury at all while Order 21, rule 90 did refer to it and made proof thereof a condition precedent for setting aside the sale; in view of this the considerations applicable to an application under Order 21, rule 90 may not be applied to an application under Order 21, rule 72 (3): the requirement that a decree-holder should obtain the Court's permission before purchasing the property

1. (1981) 2 M.L.J. 11.
2. (1981) 1 M.L.J. 472.

1. (1981) 1 M.L.J. 286.
2. (1981) 1 M.L.J. 1 (F.B.).

was intended for the benefit of the judgment-debtor and is mandatory; an application under Order 21, rule 72 (3) is an independent application and has to be dealt with in accordance with the language of that sub-rule, and that sub-rule did not insist that a sale could not be set aside if it had taken place contrary to its provisions unless the applicant showed that he had sustained substantial injury. *Manicka Gramani* v. *Venkateswara Iyer*[1], states that Order 21, rule 89 read along with rule 203 (1). of the Civil Rules of Practice establishes that in an application under Order 21, rule 89 seeking to set aside the sale poundage need not be deposited, since poundage is a charge made by the Court on the sale of the property which can be made payable under rule 203 only after the sale is set aside. *Rajan* v. *Muthusami Naidu*[2]; points out that it is in view of Order 21, rule 92 which enables persons entitled to set aside a Court-auction sale within the period prescribed for the purpose that the Courts do not proceed to confirm the sale immediately after the sale but usually postpone it to a date which would be beyond the period of 60 days now provided under Article 127 of the Limitation Act, and where the application for setting aside the sale had been filed within the period fixed by the law for preferring such application, the confirmation is of no consequence and would not render the Court *functus officio*. *Devaraja Pillai* v. *Purushotham Chettiar*[3], takes the view that if an order passed under Order 21, rule 98 holding the petitioners to be obstructors set up by the judgment-debtor and directing the removal of the obstruction caused by them is treated as a decree as provided in rule 103, a revision petition against such order is incompetent. *Ahamed* v. *Rukmani Ammal*[4], states that if there has been a reservation with regard to the right claimed and agitated and such right is not given up by the party, then, the order terminating such proceedings though worded as one of dismissal, would not amount to an order against the party; the procedure under Order 21, rule 100 is only optional and the applicant can always withdraw his application making appropriate reservation to resort to remedy under the general law of filing a title suit. *Mohammad Kassim* v. *Rahamathulla*[1], declares that the fact that a compromise requires some things to be done by the parties did not mean that the provisions of Order 23, rule 3 were not attracted. *Sri Saravana Chit Fund Co.* v. *Sekudeen*[2], declares that Order 23, rule 1 vests, the Court with power to permit withdrawal of a suit with liberty to file a fresh suit in respect of the very same subject-matter if the suit fails by reason of some formal defect and it also requires the Court to find out whether there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter or for part of the claim; where a suit had been dismissed for a formal technical defect of want of notice under section 25 of the Chit Funds Act if permission to withdraw with liberty to file fresh suit is not granted there will be miscarriage of justice as the respondent-member had admitted liability under the promissory note executed by him. *Saradamani* v. *Rajendran*[3], elucidates that the contention that the Court owes a special duty to the minor to see that the minor, party to a partition suit, does not go without representation is untenable; the code has no provision dealing with a situation in which the minor defendant is set *ex parte* or a minor's suit is dismissed for default; Order 32, rule 9 enabling the minor to move the Court to remove the guardian who does not do his duty and get another appointed in the suit involves a related application being moved before the Court by some one acting for the minor; the Court itself cannot take the initiative as its role is not investigation but adjudication; the position is different where the Court exercises over its infants its ward jurisdiction but so far as suits are concerned where a minor is array-

1. (1981) 1 M.L.J. 24.
2. (1981) 2 M.L.J. 103.
3. (1981) 1 M.L.J. 462.
4. (1981) 1 M.L.J. 315.

1. (1981) 2 M.L.J. 163.
2. (1981) 1 M.L.J. 437.
3. (1981) 2 M.L.J. 166.

ed as one of the parties Courts cannot move *suo motu* to make any order intended to protect the minor's interests; and that where the natural or legal guardian represents the minor in a suit the mere absence of a Court order appointing him or her as guarian *ad litem* will not vitiate the decree against the minor. *Perumalswamy Mudaliar* v. *Arumugham*[1], points out that according to the *Explanation* to Order 33, rule 1 (*a*) while deciding the question whether the petitioner who seeks to institute a suit as an indigent person has sufficient means or not, the subject-matter of the suit is to be excluded. *Arumbu Ammal* v. *Elamathi*[2], states that where there was no suppression at all and long after the filing of the application the applicant received a certain amount which was quite insufficient to discharge her liability to pay court-fee there was no question of the applicant being deprived of her right to get permission to sue as an indigent person. *Rukku* v. *Kannan*[3], holds that the Court whose permission is sought for filing a suit as an indigent person has to *prima facie* find that there is a cause of action for the plaintiff and the suit is not otherwise barred by law and this *prima facie* finding has to be given on the basis of the pleadings, particularly with reference to the averments made in the plaint. *Palaniammal* v. *Pallipalayam Jama Masjid Muthavalli*[4], expresses the view that whenever an injunction is to be issued against a party preventing him from participating in lawfully instituted proceedings in another civil Court, it should be done first by issue of notice and only later on after hearing both the parties the Court should pass suitable orders which would not interfere with proceedings in another Court; before exercising its inherent power instead of expecting the other Court to be prudent in not proceeding with the proceedings the Court wherein the injunction petition is filed alone should act with restraint or prudence so as to avoid embarrassment to both the Courts. *M. O. H. Aslum* v. *M. O. H. Uduman*[1], rotes that a receiver can be appointed only in a case where the plaintiff makes out a *prima facie* case as regards title to the property; a receiver cannot be appointed where the plaintiff's title to an asset is disputed, in relation to that asset pending the suit in which the title to the asset has to be established; and though the Court has got absolute discretion in the matter of appointment of a receiver the discretion has to be exercised cautiously, judiciously and according to well-established legal principles. *Muthayya* v. *Kamu*[2], makes it clear that under Order 41, rule 20 where it appeared to the Court at the hearing that any person who was a party to the suit in the Court from whose decree the appeal was preferred but who had not been made a party to the appeal was interested in the result of the appeal the Court may adjourn the hearing to a date to be fixed by the Court and direct that such person be made a respondent; under rule 20 (2) no respondent can be added after expiry of the period of limitation for appeal unless the Court for reasons to be recorded allows that to be done on such terms as it thinks fit; clause (2) would apply only to a case where the party who is not impleaded had acquired certain valuable rights by reason of an appeal as against him or her not having been filed; so far as clause (1) is concerned the Court may at any stage direct the respondent being impleaded. *Ellapuram Panchayat Union* v. *Bhavaniamman Devasthanam*[3],

1. (1981) 1 M.L.J. 483.
2. (1981) 2 M.L.J. 127.
3. (1981) 2 M.L.J. 49.
4. (1981) 1 M.L.J. 147.

1. (1981) 1 M.L.J. 67.
2. (1981) 1 M.L.J. 107.
3. (1981) 1 M.L.J. 382.

points out that it would be a very salutary practice if even in case of appeals transferred from one Sub-Court to another owing to exigencies of work-load, a notice to that effect should be given to the parties informing them that the appeal which was pending before one Court had since been transferred to another Court; it is essential that the parties must be informed by the transferee Court in order to enable them to appear before that Court and contest the proceedings so transferred by engaging other counsel and taking necessary steps in that regard; in the absence of any provision to that effect either under the Code or the Civil Rules of Practice and Circular Orders, every effort should be made by Courts to put the litigants on notice of the tranfer of pending litigations, be it to the trial Court or the appellate Court as the case may be. *Abdul Hameed* v. *Eganathan*[1], decides that where in a suit for declaration of title against the purchaser of property the sons of the vendor were impleaded as parties but remained *ex parte* and the suit was decreed, the non-impleading of these persons in an appeal against the decree would not be a ground for dismissing the appeal as they could not be interested in the result of the appeal since they claimed no right whatsoever in the suit property.

---

1. (1981) 1 M.L.J. 273.